



INTERIOR BOARD OF INDIAN APPEALS

Joette D. Willis v. Northwest Regional Director, Bureau of Indian Affairs

45 IBIA 152 (08/17/2007)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
ARLINGTON, VA 22203

JOETTE D. WILLIS,	)	Order Vacating Decision and
Appellant,	)	Remanding
	)	
v.	)	
	)	Docket No. IBIA 05-78-A
NORTHWEST REGIONAL	)	
DIRECTOR, BUREAU OF	)	
INDIAN AFFAIRS,	)	
Appellee.	)	August 17, 2007

Appellant Joette D. Willis appealed to the Board of Indian Appeals (Board) from an April 29, 2005, decision (Decision) of the Northwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA). The Regional Director declined to retroactively approve a gift deed of trust land, Umatilla Allotment No. WW-21-A, from Willard Kanine, now deceased, to Appellant. Kanine signed a gift deed application and gift deed to Appellant, his grandniece, on July 16, 2002, and died five days later. Appellant asked BIA to retroactively approve the gift conveyance. The Regional Director declined to retroactively approve the gift conveyance after finding that (1) it would not have been in Kanine's financial interest, on the date that the deed was executed, to convey the property by gift to Appellant, and (2) the record was not sufficiently clear as to whether Kanine intended to gift deed the property to Appellant or whether he understood the consequences of his actions.

We conclude that the Regional Director erred in finding that consideration of Kanine's financial interest must be determined only in reference to the date the deed was executed. In addition, when Kanine died without BIA having made an inquiry into Kanine's financial interest, that issue became moot, at least with respect to BIA's duty to protect Kanine during his lifetime. Retroactive approval will have no financial effect on Kanine, and the Regional Director has failed to articulate how retrospective consideration of Kanine's financial interest during his lifetime is relevant to retroactive approval.

With respect to the second reason relied upon by the Regional Director, we conclude that his finding of some doubt regarding Kanine's intent and the completeness of his understanding of the transaction is supported by the record. However, it is unclear

from the Regional Director's decision and from his position on appeal whether he applied too stringent a legal standard to his decision. In particular, it is unclear whether he believed that the level of doubt about Kanine's intent and understanding necessarily *precluded* him from approving the gift deed (which we conclude was not the case) or whether he simply relied on the existence of some doubt to justify his choice between two permissible alternatives. Because the decision in this case whether to approve the gift deed retroactively is committed to BIA's discretion, and because we are unable to determine to what extent BIA's exercise of that discretion may have been affected by the financial-interest issue, or by the Regional Director's understanding of the legal standard that applies to retroactive gift deed approvals, we vacate the Regional Director's decision and remand the matter to him for a new decision.

### Background

At the time Kanine executed the gift deed application and deed at issue in this case, he was 84 years old<sup>1</sup> and living with his sister, Lillian Hoptowit, in Cayuse, Oregon. It is undisputed that he was in poor health at the time. In early July 2002, Appellant — Lillian's granddaughter — apparently moved into Lillian's home after moving from Fort Hall, Idaho, where she had been living with her mother, Elaine Hoptowit.

According to Appellant, on July 5, 2002, she and Kanine had a conversation, which she summarized in her journal as follows:

[Kanine] said, "I want my own home!" He said, he didn't like living in (Lillian's house), that there was too many people coming in and out. He wanted his own house where he could sit in the living room and watch TV. I answered [him], "[N]o problem, I'm going to take care of you . . . in your own place!"

[Kanine] said, "I have my old house [on Allotment No. WW-21-A]— that needs to be torn down and we can get a new house built." [I responded "]Okay, [I'll check into it." He said, "that's the place I was saving for you and [Appellant's daughter]![] A lot of people asked me for that land and home site, but I told them no.["]

Appellant's Journal at 3. Appellant's journal states that she met with Umatilla Agency (Agency) Realty Specialist Leslie Spencer, on a date not specified, to find out what steps

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<sup>1</sup> Kanine stated on the gift deed application that he was 85 years old but identified his birthday as September 2, 1917, which would mean that he was actually 84 years old.

were necessary to have a house built. According to Appellant, Spencer said that she thought “it would be easier if he is old and can’t get around good, that he gift deed the land to you. Then, [Appellant] could do all the paper work and footwork done.” *Id.* Appellant’s journal also notes that Kanine rejected the idea of signing over power of attorney to Appellant.

According to Spencer, Appellant contacted her on July 15, 2002, and stated that Kanine wanted to gift deed Allotment No. WW-21-A to Appellant. It is unclear whether this is the same contact that Appellant described in her journal, although it may have been. The next day, Spencer went to Lillian’s home and met with Kanine and Appellant. Lillian was not present. Kanine signed a number of documents during Spencer’s visit: (1) a gift deed application to convey Allotment No. WW-21-A to Appellant; (2) a Deed to Restricted Land Special Form for Allotment No. WW-21-A, which provided that the property was being conveyed “as a gift” to Appellant; (3) a waiver of the estimate-of-value requirement;<sup>2</sup> and (4) a hand-written note to BIA stating that “I would like to gift deed WW21-A to [Appellant] to build a house on the land. WW21A is on Duff Rd. & Mann Rd.” Apparently the gift deed application, the gift deed, and the waiver of the estimate-of-value requirement were prepared by Spencer, but Appellant prepared and also signed the note to BIA. Spencer notarized the gift deed; she and Appellant signed as witnesses to the waiver of the estimate-of-value requirement.

Before Spencer left Lillian’s home, Lillian returned home, and, according to both Appellant’s and Spencer’s accounts, became upset when she learned about the gift deed transaction. The next day, Lillian went to the Agency and met with the Superintendent. The Superintendent summarized Lillian’s visit in a memorandum to file, which states:

[Lillian] was visibly upset over the [gift deed transaction]. It appears that [Appellant] was kicked out of her home in Fort Hall and she showed up on the Umatilla Reservation with no place to stay. [Lillian] stated that she allowed [Appellant] to stay with her and her brother [Kanine] for only two

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<sup>2</sup> Subsection 2216(b)(1)(A) of 25 U.S.C. requires that an Indian conveying an interest in trust or restricted land be provided with an estimate of value of the interest. However, it also provides that the estimate-of-value requirement may be waived in writing by an Indian conveying by gift deed an interest in land to an Indian person who is the owner’s spouse, brother, sister, lineal ancestor of Indian blood, lineal descendant, or collateral heir. *Id.* § 2216(b)(1)(B). The Regional Director did not find, nor does he suggest on appeal, that Appellant did not qualify as a collateral heir of Kanine for purposes of allowing him to waive the estimate-of-value requirement.

weeks until they could find a place to live. [Lillian] has taken care of her brother for several years and he was very sick at the time. She stated that he was laid out in bed and very weak.

She noticed that [Appellant] was constantly manipulating Mr. Kanine for one thing or another. She told [Appellant] that he was sick and not knowing what he was doing. [Lillian] also stated that each time she left for town and returned, that Mr. Kanine was getting out of bed and seemed to be getting weaker. She informed [Appellant] that she was to leave and be gone in two days. [Lillian] went to town from the Agency and returned home. She called me to inform me that a note had been left and [Appellant] and Mr. Kanine had left for Fort Hall. [Lillian] was again highly upset over the matter.

Memorandum from Superintendent to File, July 17, 2002. The Superintendent concluded by noting that he had asked Spencer to put a hold on the transaction request until he heard back from Lillian. A hand-written notation, dated July 17, 2002, appears on the July 16, 2002, note from Kanine to BIA: “[the Superintendent] said to put a hold on this until further notice. There is a family dispute.”

By memorandum dated July 19, 2002, Spencer advised the Superintendent that, pursuant to his request, she had “withdrawn and closed” the gift deed transaction. At the time, she did not record Kanine’s state of mind when he signed the gift deed documents, or any other details of her July 16, 2002, visit, except to state that Kanine had signed the documents and that Lillian had become very upset as Spencer was leaving and “protested the whole transaction and said she would be in the very next day to visit with the Superintendent about this.” Memorandum from Spencer to Superintendent, July 19, 2002.

On or about July 17, 2002, Kanine left Lillian’s house with Appellant and traveled to Fort Hall, Idaho, where he died five days later, on July 21, 2002.

On July 29, 2002, Appellant and Elaine went to the Agency to follow up on the gift deed transaction. According to Appellant, the Superintendent “refused to give [her] any information about the gift deed process other than to tell [her] he wasn’t going to sign it.” Declaration of Appellant, Feb. 8, 2005, at 1. The Superintendent apparently took no further action on the matter at the time.

On August 7, 2003, Elaine again contacted the Superintendent, on behalf of Appellant, to request copies of the paperwork associated with the gift deed transaction. On August 13, 2003, Lillian died. By letter dated November 6, 2003, Appellant once more requested the gift deed paperwork from the Superintendent. There is no evidence in the

record that the Superintendent ever responded to these requests. On a date not disclosed in the record, Appellant apparently verbally asked the Superintendent to approve the deed.

On April 13, 2004, at the request of an Agency Realty Officer, Spencer prepared a memorandum summarizing the events of July 16, 2002, as follows:

I visited with Mr. Kanine [at Lillian's home] for about 30 minutes before he signed any forms. I was not aware of any pre-existing mental medical condition Mr. Kanine may have had, although Mr. Kanine was very ill and could not get out of bed. In my opinion Mr. Kanine was well aware of what he was doing and stated to me he wanted [Appellant] to have land to build a home on for her and her children . . . . I was with Mr. Kanine for at least one hour and with [ ] in that time he shared many stories with me about my grandfather, not once did Mr. Kanine give me any indication that he was mentally unstable.

Spencer's memorandum explained that although it is Agency policy for two employees to do home visits, no one else was available to accompany her on July 16, 2002.

Also on April 13, 2004, the Superintendent issued a decision declining to approve the gift deed to Appellant. The Superintendent summarized the events of July 16, 2002, primarily relying on his record of the statements that Lillian had made to him on July 17, 2002. He concluded that the "unusual circumstances surrounding this case on the date in question compel [him] to believe that Mr. Kanine may have been influenced by [Appellant] to gift deed his property." Superintendent's Decision, April 13, 2004, at 1.<sup>3</sup>

Appellant appealed the Superintendent's April 13, 2004, decision to the Regional Director. Appellant argued that the record was clear that Kanine intended to gift deed the property to her, that the Superintendent ignored first-hand evidence from Spencer

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<sup>3</sup> Meanwhile, on February 25, 2004, Administrative Law Judge William E. Hammett held a hearing to determine Kanine's heirs and settle his estate. He determined that Kanine had died intestate. Appellant, through counsel, raised the gift deed issue at the hearing, and requested additional time to search for a copy of the gift deed. On April 15, 2004, Appellant, through counsel, asked Judge Hammett to stay the probate proceedings pending an appeal he intended to file from the Superintendent's April 13, 2004, decision. Judge Hammett issued an order staying the proceedings until the appellate process concerning the gift deed had run its course.

concerning Kanine's competency and the absence of fraud or undue influence, and that the evidence did not support the Superintendent's determination of possible undue influence.

On June 24, 2004, the Regional Director vacated the Superintendent's decision and remanded the matter to him for a new decision. The Regional Director concluded that the record did not reflect that the Superintendent fully considered whether approval of the gift deed would be consistent with the trust responsibility owed to Indian grantors as described in *Celestine v. Acting Portland Area Director*, 26 IBIA 220, 228 (1994), including an examination of whether the gift would be in Kanine's best interest, and whether Kanine fully understood and intended the gift deed transaction. The Regional Director instructed the Superintendent to investigate the financial impact of the transaction on Kanine and Kanine's relationship with Appellant.

On August 18, 2004, the Superintendent issued a second decision declining to retroactively approve the gift deed. The Superintendent concluded that, given the deteriorating health of Kanine, the "irregularity" of the paperwork, and the "unusual circumstances of how the request was made," the gift conveyance was not in the best interest of Kanine. Superintendent's Decision, August 18, 2004, at 2. The Superintendent also concluded that Appellant "did influence" Kanine while Lillian was absent. He did not identify the specific evidence on which he relied to make his finding of "influence," nor did he state whether it rose to the level of "undue influence."

The next day, August 19, 2004, the Agency received from counsel for Appellant copies of declarations by Lillian's daughters, Sharon John and Elaine, and by Appellant. Counsel stated that the declarations had been mailed before the Superintendent had issued his decision and requested that the Superintendent issue an amended decision after he had considered the declarations.

In their declarations, John, Elaine, and Appellant all stated that Kanine and Appellant were very close and that Kanine had stated on numerous occasions that he wanted to give Appellant property so that she could build a home. Declaration of John, Aug. 16, 2004, at 1; Declaration of Appellant, Aug. 16, 2004; Declaration of Elaine, Aug. 17, 2004. None of the declarants provided the dates on which Kanine allegedly made the statements regarding his intent or identified the property to which Kanine was referring. Appellant added in her declaration that Kanine was very sick the day he signed the deed and that he told her he "wanted to get this done before he died." Declaration of Appellant, Aug. 16, 2004. She stated that she did nothing to suggest that he execute the gift deeds, nor did she influence him to do so in any way. Elaine attached to her declaration a list of letters from Kanine to Appellant and other members of the family to demonstrate the closeness of their relationship.

The Superintendent did not issue an amended decision to take the declarations into account.

Appellant appealed the Superintendent's August 18, 2004, decision to the Regional Director. Appellant asserted that the Superintendent had failed to comply with the remand instructions in the Regional Director's June 24, 2004, decision by not conducting a further investigation into Kanine's relationship with Appellant and whether it would have been in Kanine's best interest to convey the property, and that it was "glaringly obvious that the Superintendent repackaged his prior Opinion based upon exactly the same record." Statement of Reasons filed with the Regional Director, Oct. 20, 2004, at 3. Appellant also argued that the Superintendent's reliance on Lillian's statements was misplaced and that neither age, health, nor a family dispute are a basis for denial of a gift deed transaction under *Celestine*, 26 IBIA 220.

The Regional Director vacated the Superintendent's August 18, 2004, decision on November 26, 2004, and remanded the matter to him again for a new decision. The Regional Director found that the Superintendent had not conducted the investigation required of him in the Regional Director's last remand decision, and again directed the Superintendent to investigate the financial impact of the deed on Kanine and to determine and describe the relationship between Kanine and Appellant. The Regional Director instructed the Superintendent to come to a conclusion regarding Kanine's intentions and to review the declarations submitted by Appellant.

Following the Regional Director's decision, Appellant submitted to the Superintendent eight letters from Kanine to Appellant, in order to show that Kanine and Appellant had a long-term and close relationship and that Appellant was "kindly disposed" towards Appellant. Declaration of Tim Weaver Regarding Correspondence between Kanine and Appellant, Dec. 13, 2004, at 2. The letters were written between 1992 and 2000, and mostly described Kanine's activities the day he wrote the letter in question and inquired about Appellant's well-being.

The Superintendent contacted another sister of Kanine, Edith McCloud, to discuss Kanine's financial situation and his living arrangement with Lillian. He also obtained information about lease income on Allotment No. WW-21-A and Kanine's Individual Indian Money account statements.

On January 7, 2005, the Superintendent issued his third decision, again declining to approve the gift deed to Appellant. He found that Kanine had a living arrangement with Lillian, his sole caretaker, and that Kanine depended on his trust income to support him. With respect to Kanine's letters to Appellant, he found that the letters did not contain

evidence that it was Kanine's intent to gift deed the property at issue to Appellant and that "[s]poradic correspondence over long periods of time and giving a gift or two to a relative does not constitute a close family relationship." Superintendent's Decision, Jan. 5, 2005, at 2. The Superintendent noted that Appellant had been asked to leave both her home in Fort Hall and Lillian's home, and that it appeared that "there was a desperate attempt on the part of [Appellant] to do something to gain a home site." *Id.* He concluded that "there was influence over Mr. Kanine to do a transaction that was not in his best interest while [Lillian] was absent from the home," and that given Kanine's deteriorating health and the "emotions at hand," Kanine "could have misunderstood his position to gift deed Allotment WW-21A." *Id.* at 3.

Appellant again appealed to the Regional Director. Appellant argued that the declarations filed by John, Appellant, and Lillian, as well as Spencer's April 13, 2004, statement, showed that (1) Kanine had a close relationship with Appellant and intended to gift deed the property to her; (2) Kanine was mentally stable and understood what he was doing; and (3) there was no undue influence. Appellant also argued that the Superintendent misrepresented the facts regarding Appellant's presence at Lillian's home and wrongly concluded that Appellant was desperate for a place to live. In addition, Appellant asserted that the Superintendent erred in concluding that the gift deed transaction would have had a substantial financial impact on Kanine and that, in any event, the issue of the financial impact of the transaction on Kanine became moot upon Kanine's death. Statement of Reasons filed with the Regional Director, March 7, 2005, at 1. Appellant asked the Regional Director to independently review the facts surrounding the gift conveyance and make his own determination of whether to retroactively approve the gift deed.

Appellant submitted with her statement of reasons the declaration of Rodney Bonifer, an employee of the lessee of Allotment No. WW-21-A.<sup>4</sup> Bonifer stated that during "one of [his] many conversations" with Kanine, Kanine "made it plain that he intended to pass his interest in Allotment WW-21-A to his niece in Wapato, Washington." Declaration of Bonifer, Feb. 8, 2005. Bonifer also stated that Kanine brought his niece to the lessee's office, introduced her to him, and "mention[ed] that she would be the person we would be dealing with in the future regarding farming decisions for Allotment WW 21-A." *Id.*<sup>5</sup>

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<sup>4</sup> According to the record, Allotment No. WW-21-A was leased to Tubbs Ranch.

<sup>5</sup> Appellant also submitted a declaration by Elaine in which she challenged several of the statements made in the Superintendent's January 7, 2005, decision.

Appellant also attached to her statement of reasons a declaration she had prepared, in which she stated that she recalled Kanine taking her to the lessee's ranch, and introducing her as "the next owner of Allotment WW 21-A." Declaration of Appellant, Feb. 8, 2005, at 2. Finally, she attached to her statement of reasons her "journal" for July 2002.<sup>6</sup> She described Kanine's poor health, taking care of Kanine while she stayed at Lillian's home, and the tension between Kanine and Lillian. As described above, her journal summarized a conversation between Appellant and Kanine in which Kanine expressed a desire to move out of Lillian's house and into a home of his own.

On April 29, 2005, the Regional Director issued the decision that is the subject of this appeal. The Regional Director first stated that he had decided to independently review the information in the record and determine whether it is appropriate to approve the gift deed.

The Regional Director declined to approve the gift deed to Appellant. The Regional Director found that (1) it would not have been in Kanine's financial interest to gift deed the property at issue to Appellant because the loss of more than one half of his trust income would have materially affected his standard of living; (2) the record indicated that Appellant and Kanine had a long standing relationship that could be characterized as "close," but the record "d[id] not unequivocally indicate that Kanine intended to give the allotment to [Appellant] in July 2002," Decision at 6; and (3) the events that precipitated the contact with BIA and the preparation of the deed suggested that Kanine may not have been fully aware of the consequences of his actions.

The Regional Director rejected Appellant's argument that Kanine's death rendered the question of his best interest moot and found that the consideration of how the gift deed would have affected Kanine financially must be done as of the date the deed was executed. In finding that it was not clear that Kanine intended to give the property to Appellant, the Regional Director found that the declarations submitted by Appellant did not address Kanine's specific intentions in July of 2002 and the declaration from Bonifer lacked persuasive weight due to its lack of detail. The Regional Director also found that Kanine's statement that he wanted his own home suggested that it was "[j]ust as likely [that in signing the gift deed application] he thought that he was taking the steps necessary for a house to be constructed on that property for himself." Decision at 6. The Regional Director concluded that, "[c]onsidering [Kanine's] age, his health, the haste in which the transaction was conducted, and the ambiguity in Kanine's actions, [he] must conclude that

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<sup>6</sup> Appellant's journal is not dated. It is unclear whether she wrote the entry attached to her statement of reasons contemporaneously with the events described therein or at a later date.

there is some question about whether Kanine fully understood and intended to convey his allotment by gift to [Appellant].” *Id.*

Appellant appealed to the Board, and included a Statement of Reasons in her notice of appeal. Appellant and the Regional Director filed briefs.<sup>7</sup>

## Discussion

### A. Standard of Review

The regulations governing conveyances of trust or restricted land require Secretarial approval of an application for a gift conveyance of trust or restricted land and the actual conveyance. *See* 25 C.F.R. §§ 152.17, 152.22(a), 152.23, 152.25(d); *see also Bitonti v. Alaska Regional Director*, 43 IBIA 205, 212-13 (2006); *Estate of Joseph Baumann*, 43 IBIA 127, 136 (2006). BIA’s decision in this case whether to approve or deny Kanine’s gift deed retroactively is a discretionary one. *See Bitonti*, 43 IBIA at 211; *Wishkeno v. Deputy Assistant Secretary - Indian Affairs (Operations)*, 11 IBIA 21, 32 (1982).

When a decision is based on the exercise of discretion, the appellant bears the burden of showing that BIA did not properly exercise its discretion. *Anderson v. Acting Southwest Regional Director*, 44 IBIA 218, 225 (2007). In reviewing such decisions, the Board may not substitute its judgment for that of BIA. *Barber v. Western Regional Director*, 42 IBIA 264, 266 (2006); *White v. Acting Deputy Assistant Secretary - Indian Affairs (Operations)*, 15 IBIA 142, 146 (1987). The Board’s role is limited to determining whether BIA’s decision is in accordance with the law, is supported by the record, and is adequately explained. *Scrivner v. Eastern Oklahoma Regional Director*, 44 IBIA 147, 150 (2007).

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<sup>7</sup> On June 13, 2005, Indian Probate Judge M.J. Stancampiano issued an order partially lifting the stay of Kanine’s probate proceedings as to the portion of Kanine’s trust estate which is not subject to the gift deed in question. On July 13, 2005, Judge Stancampiano issued an Order Determining Heirs. He concluded that, pending Appellant’s appeal before the Board, BIA was prohibited from transferring the ownership of Allotment No. WW-21-A and related funds to Kanine’s heirs. He found that, if the Board were to hold that Kanine still owned an interest in Allotment No. WW-21-A when he died, that BIA should distribute that property in accordance with the Order Determining Heirs. No petitions for rehearing have been filed.

## B. Kanine's Financial Interest

Although no evaluation of Kanine's financial interest was conducted during his lifetime, the Regional Director found that it would not have been in Kanine's interest to convey the property at issue to Appellant because over half of his income was generated by the property and the loss of such income would have materially affected his standard of living. He further found that the relevant time frame for considering how the gift deed transaction would affect Kanine financially was when the deed was executed, and not when BIA was considering whether or not to approve the conveyance — in this case two to three years after Kanine's death.

On appeal, Appellant contends that the relevant time period for evaluating Kanine's financial interest was when BIA was deciding whether or not to approve the gift deed, and that because Kanine had died, the issue was moot. In response, the Regional Director, relying on the Supreme Court's decision in *Lykins v. McGrath*, 184 U.S. 169 (1902), argues that "[t]he law provides that Secretarial approval of a deed after the death of the grantor relates back to the day the deed was executed . . . [and] [t]o be consistent with th[is] legal fiction . . . , the Regional Director's consideration of the relevant factors prior to approving or not approving the deed should also relate back to when the deed was executed." Answer Brief at 5-6.

We disagree. *Lykins* concerned the legal effect of the conveyance itself, and not the factors to be considered in deciding whether to retroactively approve the gift deed or the relevant time frame for considering these factors. Whether or not retroactive approval of a gift deed relates back to the date of the deed for purposes of determining when title is deemed to have transferred, BIA's decision whether to approve a gift deed must be made based on the facts and circumstances known to BIA at the time of BIA's decision. We do not think that BIA can ignore a change of circumstances between the time a grantor executes a gift deed and the time BIA decides whether to approve or disapprove it. We therefore disagree with the Regional Director that *Lykins* requires the Regional Director to consider whether the transaction was in Kanine's financial interest at the time the conveyance is deemed to occur for purposes of transfer of title.

The Board has held that in considering whether to approve a gift conveyance during the prospective grantor's lifetime it is BIA's duty to make a careful examination of the circumstances to determine whether the transaction is in the donor's best interest. *Celestine*, 26 IBIA at 228. The Board has never directly addressed the relevance of a "best interest" inquiry in the context of retroactive (posthumous) approval of a gift deed. In at least one case, however, the Board upheld BIA's retroactive approval, although there was no evidence

that BIA made any “best interest” finding. *See Leon v. Albuquerque Area Director*, 23 IBIA 248 (1993).

When Kanine died, his financial interest and BIA’s duty to protect that financial interest undoubtedly became moot. Perhaps because the Regional Director concluded that the relevant time period for considering Kanine’s financial interest was fixed as the date the gift deed was executed, the Regional Director failed to articulate the relevance, if any, of Kanine’s financial interest during his lifetime to BIA’s decision whether or not to approve the gift deed retroactively. Arguably, when BIA fails to make a determination during a grantor’s lifetime whether a prospective gift conveyance is in the grantor’s best interest, that issue — as a separate consideration — becomes moot when BIA is deciding whether to approve a gift deed retroactively after the grantor’s death. *Cf. Estate of Mary Dorcas Gooday*, 35 IBIA 79, 83 (2000) (upholding ALJ’s recommended decision to retroactively approve a gift deed, although there was conflicting testimony from BIA officials as to whether the gift deed would have been approved under the circumstances that existed at the time it was executed). We need not decide this issue in this decision, however, because the Regional Director’s error in fixing the relevant time period as the date the deed was executed is sufficient for us to vacate and remand. On remand, if the Regional Director again declines to approve the gift deed and again relies on Kanine’s financial interest, directly or indirectly, he must articulate his basis for doing so in the context of Appellant’s request for posthumous approval of the deed.

### C. Kanine’s Intent and Understanding

Appellant contends that the Regional Director abused his discretion in relying on a finding that the record was unclear as to whether Kanine understood what he was doing when he executed the deed and that Kanine intended to gift deed the property to Appellant. Appellant argues that the following evidence supports her assertion that Kanine intended to give the property to her and understood what he was doing: (1) her declaration and the declarations by John and Elaine, stating that Appellant and Kanine were close and that Kanine wanted to give Appellant an interest in his property; (2) Bonifer’s declaration, in which he stated that Kanine intended to pass his interest to his niece and that Kanine introduced his niece as the person he would be dealing with for Allotment No. WW-21-A; (3) Spencer’s memorandum, in which she stated that she visited with Kanine for an hour and Kanine said that he wanted Appellant to have land to build a home on and that Kanine was well aware of what he was doing; (4) Kanine’s signing of the gift deed application, gift deed, waiver of the estimate-of-value requirement, and note stating that he would like to gift deed property to Appellant; and (5) Appellant’s declaration, in which she said that she did nothing to suggest that Kanine execute the gift deed nor did she influence him to do it. Appellant argues that the Regional Director erred in relying on Appellant’s statement in her

journal — that Kanine wanted his own house — to support his conclusion that Kanine did not intend or understand the gift deed transaction. Appellant points to Kanine’s subsequent statement that Allotment No. WW-21-A was “the place [he] was saving for [Appellant]” and his signing the gift deed paperwork as showing that Kanine intended Appellant to have the property. Appellant asserts that Spencer’s statement was the “only real evidence” of Kanine’s mental state and intent at the time he signed the deed. Opening Brief at 14.

We conclude that it was not unreasonable for the Regional Director, considering the totality of the circumstances surrounding the gift conveyance at issue in this case, to find some doubt about whether Kanine fully understood the effect of the gift transaction. Appellant is correct that Kanine’s completion of the gift deed paperwork along with Spencer’s statement describing Kanine’s mental state and the statement that he wanted to gift deed the property to Appellant are evidence that Kanine intended and understood the conveyance. However, other evidence in the record, relied on by the Regional Director, raises at least some question about Kanine’s intent and whether he fully understood the nature and consequences of the transaction.

It was Appellant who contacted BIA about Kanine executing the gift deed, not Kanine, and both the BIA realty officer and Appellant appear to have decided that the gift deed was the most practical way for Appellant to be able to control the property and build a home on it for Kanine. Evidence in the record shows that Kanine had a strained relationship with Lillian and that he wanted his own home on Allotment No. WW-21-A. Appellant’s Journal at 1, 3 (“[Kanine] said ‘I want my own home!’ . . . I [don’t] like living in (Lillian’s house) . . . [Kanine] wanted his own house where he could sit in the living room and watch TV. [Appellant responded to Kanine] . . . ‘I’m going to take care of you Uncle, in your own place!’ . . . [Kanine] said, ‘I have my old house . . . [on Allotment No. WW-21]— that needs to be torn down and we can get a new house built”). Appellant recounted in her journal how Spencer told her that, because of Kanine’s age, his difficulty moving around, and the difficulty of having a house built, it would be easier if Kanine were to convey by gift deed the property on which he wanted the house to be built because Appellant could do the footwork.<sup>8</sup>

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<sup>8</sup> Appellant suggests that the Regional Director erred in relying on this evidence because it was offered to show that Kanine and Appellant had a close relationship and that he intended to give the property and therefore should not be used to question Kanine’s intent. We disagree. Regardless of the purpose for which Appellant offered the evidence, it was permissible for the Regional Director to consider its relevance in other contexts.

Of course, the evidence might reasonably be interpreted to support a finding that Kanine fully understood what he was doing and was willing to entrust the matter of building a house to Appellant, with whom he was close. Nevertheless, Appellant's journal entries support the Regional Director's concern that Kanine may not have fully understood the legal consequences of conveying the property by gift deed to Appellant. The issue is not whether Appellant was acting in good faith — we assume here that she was — but whether there is evidentiary support for the Regional Director's finding that Kanine may not have fully understood the gift deed transaction.

In addition, Lillian told the Superintendent that she told Appellant that Kanine “was sick and not knowing what he was doing.” Memorandum from Superintendent to File, July 17, 2002.<sup>9</sup> Lillian's statement that Appellant did not know what he was doing appears to contradict the observations later recorded by Spencer, who might be considered the more objective observer under the circumstances. However, Lillian's statement was not one to be ignored, thus warranting further inquiry by BIA. However, because Kanine died only five days after he executed the gift deed, BIA was unable to follow up with him to verify his intent and understanding. Although Appellant asserts that the Regional Director should have assigned more weight to Spencer's statement because she is a BIA employee and offers the “only real” evidence of Kanine's state of mind and intent at the time he signed the gift deed, our task is not to dictate to BIA how it must weigh otherwise probative evidence.

We also find that it was reasonable for the Regional Director to decline to assign persuasive weight to the declarations in the record because of their lack of detail: the declarations from Appellant, John, and Elaine did not identify which interest Kanine intended to convey to Appellant or when the alleged conversations took place, and Bonifer's declaration also did not mention the date on which his conversation with Kanine took place.

In sum, given Kanine's age and health, the fact that he died only five days after he signed the gift deed, and the evidence that he thought he was taking the steps necessary to

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<sup>9</sup> Appellant also asserts that Lillian's statement was “hearsay” and that the Regional Director erred in relying on it. Opening Brief at 5. Although we agree that Lillian's statement, as reported by the Superintendent, is at best a vague allegation and not supported by any specific evidence of undue influence or manipulation, we do not read the Regional Director's decision as relying on Lillian's statement. To the extent that he may have considered it, however, there is no evidentiary rule barring the consideration of hearsay evidence by the Regional Director, although the weight to be given to hearsay evidence is within the Regional Director's discretion. *Cf.* 43 C.F.R. § 4.232(b).

have a house built for himself, we find that there is evidence in the record to support the Regional Director's finding that the evidence showed some doubt that Kanine intended to convey the property by gift deed to Appellant and that he fully understood the consequences of the transaction. Where, as here, the evidence creates at least some doubt concerning a grantor's intent and understanding regarding a gift deed, the Regional Director is well within his discretion to decline to approve it retroactively.

On the other hand, we note that in his decision and in his brief on appeal, the Regional Director suggests that he was reaching his decision, and that it should be upheld by the Board, because Kanine's intent and understanding were not "unequivocally clear." Answer Brief at 1. However applicable this standard may be for BIA to refrain from approving a gift deed by a living grantor, we conclude that it does not necessarily constrain BIA's exercise of its discretion to approve a gift deed retroactively.

Previous Board decisions have not clearly distinguished between a BIA decision whether to approve a conveyance during a prospective grantor's lifetime, on the one hand, and a BIA decision whether to approve a gift deed retroactively after a grantor's death, on the other. We conclude that between the two, BIA's discretion in deciding whether to approve a gift deed retroactively is somewhat broader. The Board's precedent is clear that during a prospective grantor's lifetime, if there is any doubt about whether the grantor of a gift of trust property intends to convey the property to a prospective grantee, or understands the consequences of the conveyance, BIA must refrain from approving the gift deed. *See Barber* 42 IBIA at 266; *Celestine*, 26 IBIA at 228. During a prospective grantor's lifetime, BIA has a clear duty to ensure that the grantor intends to convey the property and understands the consequences of the conveyance, before BIA approves the conveyance. Thus, when a grantor's intent or understanding is unclear, BIA should make further inquiry or seek confirmation concerning that intent and understanding.

If, however, an additional inquiry or a decision is not made before a prospective grantor dies, and a prospective grantee requests that a gift deed be approved retroactively, then BIA must determine, without the ability to further examine or inquire of the grantor directly, whether the evidence of the grantor's intent and understanding are sufficiently clear to warrant approval of a gift deed. If reasonable doubt exists regarding the grantor's intent and understanding, or other factors such as fraud or undue influence, then BIA is well within its discretion to decline to approve a gift deed retroactively. On the other hand, even if some doubt may exist, if the evidence as a whole indicates that the grantor did intend to convey the property by gift deed to the prospective grantee, did understand the consequences of such a gift, and was not subject to fraud or undue influence, then BIA is still within its discretion to effectuate the grantor's wishes by approving the gift deed retroactively. In other words, BIA is not precluded from approving a gift deed retroactively simply because the record is not "unequivocally clear." To the extent that previous Board

cases do not distinguish between approval of an *inter vivos* gift conveyance and posthumous approval of a gift deed, we now clarify that when BIA decides whether or not to approve a gift deed retroactively, it should satisfy itself that the grantor's intent and understanding were reasonably clear, but it need not establish that the deceased grantor's intent and understanding were "unequivocally clear" or that the record is "absolutely clear."

The Board's role, of course, is limited when we review a BIA decision whether to retroactively approve a gift conveyance. Our role is not to independently weigh the evidence and substitute our judgment for that of BIA. Instead, we examine whether the Regional Director's decision is based on the proper legal standard and is supported by the record. In the present case, we cannot determine whether the Regional Director decided that he could not approve Kanine's gift deed because the record was not "unequivocally clear" with respect to Kanine's intent and understanding, or whether he simply decided that he would not do so, based on the evidence as a whole. In addition, we do not know to what extent the Regional Director's consideration of Kanine's financial interest affected his decision. Because this is a decision that is committed to BIA's exercise of discretion, we vacate the Regional Director's decision and remand the matter for issuance of a new decision.

#### Conclusions

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board vacates the Regional Director's April 29, 2005, decision, and remands the matter for further consideration and a new decision.<sup>10</sup>

I concur:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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// original signed  
Debora G. Luther  
Administrative Judge

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<sup>10</sup> We are well aware that this matter has already been reviewed several times by the Superintendent and the Regional Director, before coming to the Board. To the extent that it would be appropriate, and not inconsistent with other priorities, the Regional Director may wish to consider whether to expedite issuing a new decision on remand. If an appeal is filed from that decision, the Board will consider giving it expedited consideration.